No. 830.

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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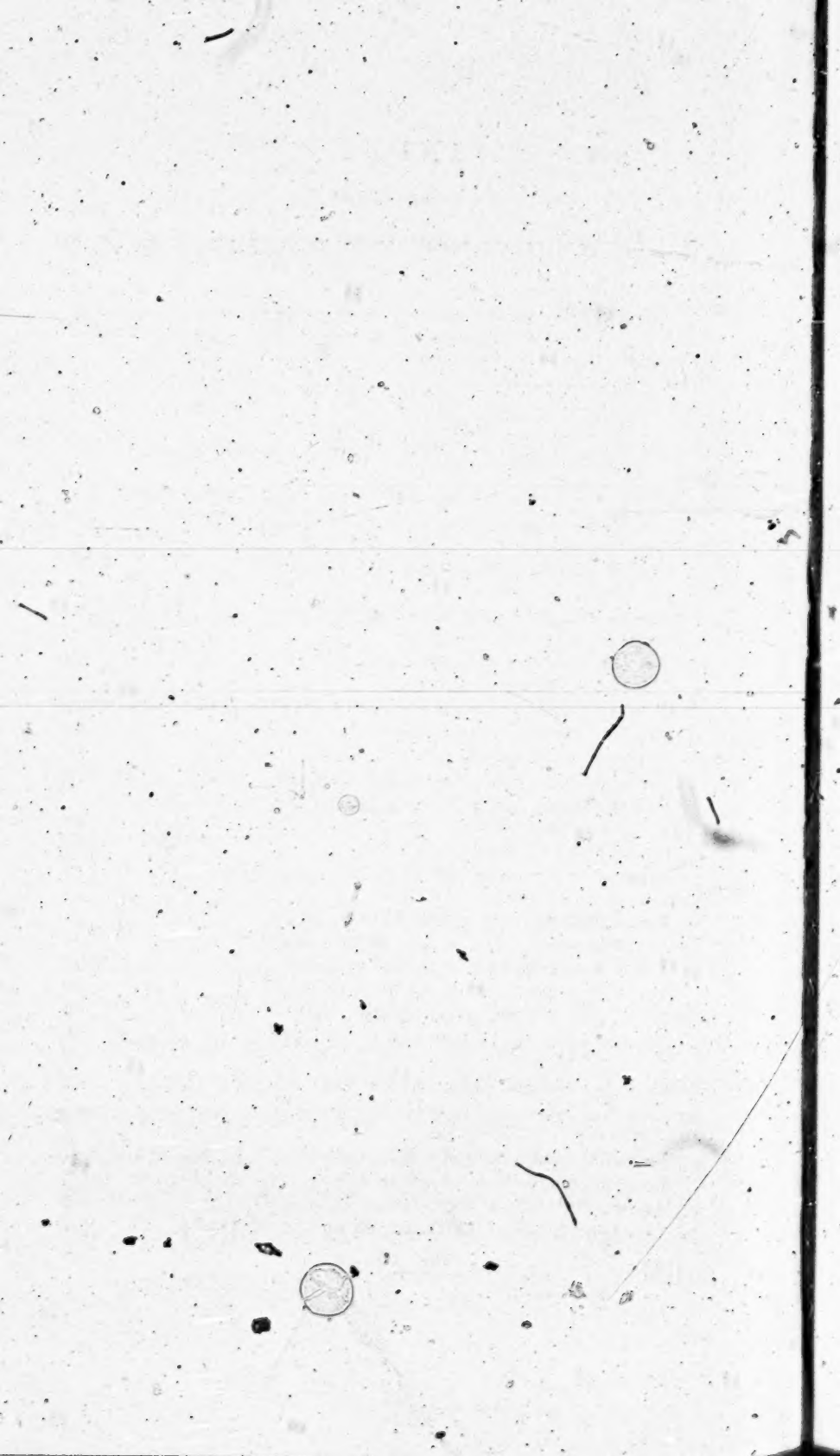

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OPINION BELOW

The opinions of the Court of Claims (R. 8–10) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9–10). A motion by petitioner for a new trial was denied October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941, and was granted on February 16, 1942. The jurisdiction of this Court is invoked under section 3 of the Act of February 13, 1925, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, 53 Stat. 752.

QUESTION PRESENTED

Whether the United States remains under any obligation to the Seminole Nation with respect to execution of the provision of Article III of the treaty of March 21, 1866, for granting a tract of 200,000 acres of land to the Seminoles.

STATUTES INVOLVED

The relevant statutory and treaty provisions are set forth in the Appendix, *infra*, pp. 23–30.

STATEMENT

By Article III of the treaty of March 21, 1866, 14 Stat. 755, 756, the Seminole Nation ceded and conveyed to the United States its entire domain in the Indian Territory in consideration of the payment by the Government of $325,362. The same article went on to provide:

> * * * The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Ca-

nadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, * * *.

These provisions refer to the treaty with the Creek Nation as if it were already in effect. Although negotiations with the Creeks were in progress at the time the Seminole treaty was made, in fact the Creek treaty was not concluded until June 14, 1866,[1] and the dividing line between the halves of the Creek country was still undetermined on March 21, 1866.[2] Late in 1866, before

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[1] The treaty of June 14, 1866, between the United States and the Creek Nation appears in 14 Stat. 785.

[2] The chronology of events with respect to the Seminole and Creek treaties of 1866 is set forth as follows in the Report of the Commissioner of Indian Affairs, 1881, p. LIV:

"In explanation of the discrepancy in the dates of the Creek treaty above given, it should be stated that after the treaty of February 6, 1866 was made and forwarded to the President for ratification by the Senate, objections were made by the delegates representing the Southern Creeks to certain stipulations not therein contained; that two subsequent treaties, dated, respectively May 9 and May 21, 1866, were prepared, covering the objectionable features of the former treaty; but not until the 14th of June, 1866, was a satisfactory treaty presented that all the delegates were willing to sign. In the meantime the Seminole treaty was made."

the boundaries of the Seminole domain had been located, the Seminoles moved to what was assumed to be the treaty land (R. 7).

On December 28, 1867, the Superintendent of Indian Affairs made a contract with one Rankin to survey the line dividing the two halves of the Creek country,[3] as provided in Articles III and VIII of the Creek treaty, 14 Stat. 785, 786, 788. When located, this line was to become the western boundary of the Creek domain and the eastern boundary of the 200,000-acre tract purchased by the Seminoles. When this dividing line had been surveyed those Seminoles who had settled to the east moved west of the Rankin line (R. 17). While the line fixed by Rankin appeared to be generally satisfactory to the Seminoles, the Creeks complained that it placed the division too far east. The Rankin survey did not receive approval from the Department of the Interior, presumably because of the objections made by the Creeks.

In 1871 the line dividing the Seminole and the Creek territories was resurveyed by one Bardwell. This survey, which was approved by the Secretary of the Interior on February 5, 1872, fixed the dividing line seven miles west of the Rankin line (R. 7). Two months after Bardwell's survey, the Government directed one Robbins to run the west-

[3] Report of the Commissioner of Indian Affairs, 1881, p. LIV.

ern boundary of the Seminole lands, so as to include 200,000 acres from the eastern boundary. This survey also was approved by the Secretary on February 5, 1872 (R. 7).

Meanwhile, by Article I of the treaty of February 27, 1867, 15 Stat. 531, the United States agreed that a delegation from the Pottawatomie tribe of Indians should accompany a government commission to the Indian country—

> * * * in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation. * * *

The Pottawatomie tribe selected a tract bounded on the east "by the West line of the Seminole lands", and on November 9, 1870, the Secretary of the Interior approved the selection, directing, however, that until that west line was surveyed and marked the Pottawatomies should locate far

enough west of the Seminoles to avoid intrusion upon the Seminole lands.[4] In 1872 the Pottawatomies occupied the territory immediately west of the Robbins line (R. 3). Subsequently, the United States allotted and patented the lands west of the Robbins line to the Pottawatomies in severalty or sold and patented them to settlers under the homestead laws (R. 7). Act of May 23, 1872, 17 Stat. 159; Act of February 5, 1887, 24 Stat. 388–391; Act of March 3, 1891, 26 Stat. 989, 1016, 1017.

Bardwell's survey had disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by Seminoles, who had made substantial improvements on this land (R. 7–8; Report of the Commissioner of Indian Affairs, 1881, p. LV). When the Creeks learned that the Seminoles had settled in part upon unceded Creek land, they claimed and began to exercise jurisdiction over all of the area up to the Bardwell line. The Seminoles, fearing loss of their improvements and the lands on which these had been made, appealed to the Government for protection and relief, requesting that they be permitted to keep the land on which they had settled.[5] Their appeal at once brought response from the Government, which informed the Creeks that

[4] See letter of the Secretary of the Interior, dated November 3, 1870, to the Commissioner of Indian Affairs. This letter is set forth in the Appendix, *infra*, p. 29.

[5] See Report of the Commissioner of Indian Affairs, 1881, p. LV; Report of the Secretary of the Interior, 1872, p. 625.

until the boundary question was settled by the Department of the Interior the Seminoles must be left undisturbed.[6]

In order that the Seminoles might retain the lands which they had improved, Congress authorized the Secretary of the Interior to negotiate with the Creeks for the purchase of these lands east of the Bardwell line. Act of March 3, 1873, 17 Stat. 626. On February 14, 1881, the Secretary entered into an agreement with the Creeks whereby the latter Nation ceded to the United States land east of the Bardwell line, the agreement providing that the eastern boundary of the land ceded should be so drawn that the tract would aggregate 175,000 acres. See *Creek Nation* v. *United States*, 93 C. Cls. 561, 566.[7] In 1881 the Commissioner of Indian Affairs recommended an appropriation of $175,000 for the purchase, the land to be held for the use of the Seminole Nation provided it relinquish a like quantity in the west to the United States.[8] The United States paid the

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[6] Report of the Commissioner of Indian Affairs, 1873, pp. 145, 152.

[7] Later the Creeks claimed that the tract comprised more than 175,000 acres, and sued to recover compensation for the excess, alleged to be 2,397.71 acres. The Court of Claims found that it was 1,198.99 acres, but denied recovery because the Creeks had intended to convey the whole tract for the consideration of $175,000 and because cession of the whole was ratified by agreement of January 19, 1889, Act of March 1, 1889, c. 317, 25 Stat. 757. *Creek Nation* v. *United States*, 93 C. Cls. 561, 570–571.

[8] See Sen. Doc. No. 75, 47th Cong., 1st Sess., p. 2 (1882).

Creeks $175,000 for the tract east of the Bardwell line. Act of August 5, 1882, 22 Stat. 257, 265 (appropriation). Congress in the appropriation act omitted to provide any requirement that the Seminoles relinquish land in the west in return for the tract newly obtained from the Creeks. This land became a part of the Seminole reservation and was disposed of either by allotment to members of the tribe or by sale for the account of the tribe. See Act of July 1, 1898, 30 Stat. 567; Record, *Seminole Nation* v. *United States*, No. 348, this Term, pp. 16–17.

A survey completed by the United States Geological Survey shortly before 1900 indicated that there was a shortage in the total area of Seminole lands, so that the two Seminole tracts aggregated less than 375,000 acres (R. 19–20). The Seminoles complained of the alleged shortage in a letter dated January 17, 1900, addressed to the Commissioner of Indian Affairs, stating that the Seminoles were entitled to receive additional land (R. 19). Apparently it was assumed by the Seminoles that the shortage occurred by reason of an erroneous survey of the 175,000-acre tract purchased from the Creeks in 1882 (R. 19–22). The Department of the Interior on August 24, 1900, directed the Commissioner of the General Land Office to inquire into the alleged shortage (R. 21). On October 10, 1900, the Commisisoner replied that the 175,000-acre tract had been carefully sur-

veyed in 1888, on the basis of the Bardwell line, and that if any deficiency existed in the total Seminole territory it was the result of error in surveying the original 200,000-acre tract (R. 21–22). The Acting Secretary of the Interior on October 16, 1900, communicated the substance of this report to the United States Commission to the Five Civilized Tribes in the Indian Territory, concluding that the Seminoles were not entitled to have further lands segregated for them from the Creek Nation (R. 21, 22).

In an amended petition filed in the Court of Claims in the present proceedings in 1937, the Seminole Nation alleged that owing to an error in location of the Robbins line, the territory originally intended to be enclosed between the Bardwell and Robbins lines was 11,550.54 acres short of 200,000 acres, and that the United States had taken from the Seminoles 11,550.54 acres west of the Robbins line when the Government patented that land to individuals in 1892 and after; petitioner then prayed judgment against the United States for the value at the time of taking of the 11,550.54 acres, with interest at five per centum per annum (R. 3–5).[9] The United States

[9] During the trial in the Court of Claims a new survey was undertaken by Arthur D. Kidder pursuant to instructions of the General Land Office, which were issued January 14, 1941, on request of the Department of Justice made in a letter dated January 3, 1941 (R. 10–11). Kidder concluded in his

filed a general traverse to the petition and asked that it be dismissed (R. 5). The Court of Claims made no finding whether a shortage in fact existed in the tract between the Robbins and Bardwell lines (R. 7), but held that in any event the Seminole Nation had been more than compensated for the alleged shortage by the Government's purchase in 1882 for the Seminoles of over 175,000 acres ceded by the Creek Nation (R. 8–9). The court also stated (R. 9) that even if petitioner were entitled to recover for the taking of a part of the 200,000-acre tract originally agreed upon the Government would be entitled to offset the value of the additional land east of the Bardwell line which the Seminoles received in 1882, as a gratuity under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. The Court of Claims accordingly ordered the petition dismissed on May 5, 1941 (R. 9–10). Petitioner's subsequent motion for a new trial, filed July 10, 1941, was overruled on October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941, and was granted February 16, 1942. (R. 36).

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report that a shortage of 9,152.83 acres existed in the intended 375,000-acre total area of Seminole lands. According to his calculations the 175,000-acre tract contained an excess of 1,198.99 acres, while there was a deficiency of 10,351.82 acres in the 200,000-acre tract (R. 16). Accordingly, in the petition for certiorari petitioner limited its claim for compensation to the value of 10,351.82 acres at the time of the alleged taking (Pet. 4, 9, 12, 13).

DISCUSSION

Petitioner has grounded its suit on the theory that Article III of the treaty of March 21, 1866, 14 Stat. 755, 756, effected a grant *in praesenti*, vesting title to 200,000 particular acres of land in the Seminole Nation, prior to location of the granted lands by survey.[10] Starting with this premise, petitioner alleged that, owing to an error in the location of the Robbins line, the tract was short of 200,000 acres, and that the Government took from the Seminoles a strip west of the Robbins line when it patented the Pottawatomie territory to individuals between 1892 and 1927.

Petitioner has contended that its rights are unaffected by the fact that the United States in 1882 purchased for the Seminoles approximately 175,000 acres additional on the east. It has argued that the transactions through which the shortage on the west boundary occurred are distinct from those which resulted in the addition on the east, and that if the addition of territory on the east can be considered at all, it can only form the basis for an offset under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596, which directs that funds expended gratuitously for the benefit of an Indian tribe be offset against any liability of the United States determined by the Court of Claims.

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[10] Since the United States did not acquire title from the Creek Nation to the land in question until June 14, 1866, the latter date was the earliest on which a vesting could have occurred.

Accordingly, petitioner demanded judgment for the value of the strip west of the Robbins line as of the dates of the patents (1892–1927), rather than as of the date of the occupation by the Pottawatomies (1872), in the amount of $361,633.11,[11] together with interest (estimated at $610,000.00 as of the present time), or a total of $971,633.11. The treaty price of the Seminole land, paid to the United States pursuant to Article III of the treaty of March 21, 1866, was fifty cents per acre; on this basis the value of a strip containing 10,351.82 acres was $5,175.91 in 1866.

In the court below the Government made three arguments. Its first contention was that the petitioner had failed to establish a shortage in the 200,000-acre tract. Next, the Government urged that even if there was a shortage the petitioner could not recover because since 1872 the Seminole Nation had recognized and treated the Robbins line as the true western boundary of its domain. The Government's third argument was that if lands had been taken from the Seminoles the taking occurred in 1872 when the Pottawatomies were placed in possession of the lands west of the Robbins line rather than when patents were issued beginning in 1892.

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[11] This figure is taken from petitioner's request for findings of fact filed in the Court of Claims December 5, 1938; that request was based on an assumed deficiency of 11,550.54 acres.

As has been stated (page 10, *supra*), the Court of Claims made no finding whether a shortage in fact existed in the tract between the Robbins and Bardwell lines, but held that even if the alleged shortage existed the Seminole Nation had been compensated fifteenfold by the Government's purchase in 1882 for the Seminoles of over 175,000 acres ceded by the Creek Nation. The court further held that if petitioner were entitled to any monetary recovery the Government would be entitled to offset the value of the additional land east of the Bardwell line which the Seminoles received in 1882, as a gratuity under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596.

1. The Government believes that the judgment below, dismissing the petition of the Seminole Nation, is not sustainable on the second ground advanced in the opinion of the majority of the Court of Claims. The Act of August 12, 1935, directs the Court of Claims in suits by an Indian tribe or band "to consider and to offset against any amount found due the * * * tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band." As this language makes plain, the Court of Claims must first find that money is due from the United States and, having so found, must then consider whether the United States has gratuitously spent sums for the benefit of the tribe and, if it finds such gratuitous

expenditures, offset them against the amount found due.

In the present case the Court of Claims did not find whether the United States was under any liability to the Seminole Nation and, if so, the amount of liability. The majority opinion only stated (R. 9) that the value of the offset was "far in excess of the value of whatever deficit [of land] there may have been." While this, together with earlier statements in the opinion, implies that the court assumed a shortage of about 11,550.54 acres and that the court held the consequent liability of the United States to be very much less in amount than $175,000 (probably $11,550.54), we think that the process of determination followed by the court in arriving at the dismissal of the petition below did not accord with the requirement of the offset statute.

The Seminole Nation has brought a number of suits against the United States. All amounts gratuitously expended by the United States for the benefit of that Nation constitute a fund upon which the Government can draw whenever in any suit the Court of Claims finds that the Government has incurred a liability to the Seminoles. If in respect of a particular suit the Government owes nothing, it is entitled to a judgment of dismissal on that ground and should not be compelled to use gratuity expenditures. And when the Government is under

liability, and the amount has been found by the Court of Claims, the Government should not be held to satisfy its liability by the use of gratuity expenditures in excess of the liability. Conversely, the Seminole Nation is entitled to have an exact determination of the amount owed it by the United States on a cause of action in order that an amount of gratuity expenditures equal to the liability be exhausted, or that, if a sufficient amount of offsets is not available, it receive a money judgment for the difference.

2. The judgment below could be sustained on the first ground of decision advanced by the Court of Claims. The court pointed out that while the Seminoles were entitled under the treaty of 1866 to acquire 200,000 acres of land they had in fact received at least 360,000 acres, and the court held that even though there might have been a deficit in the 200,000-acre tract the petitioner was compensated therefor "fifteenfold" by the Government's gift of an additional 175,000 acres. Underlying this ground of denying recovery to petitioner was the theory that the acquisition of land by the Seminoles under the treaty of 1866 and the acquisition of additional land to the east by transfer from the Creeks should be regarded as an integral transaction for the purpose of determining whether the United States has incurred any liability with respect to the 200,000-acre tract, in view of the course of events preceding the Creek cession in 1882; if the

two acquisitions are so regarded, the treaty provision was in substance carried out, leaving the Seminoles with 200,000 acres of land and approximately 165,000 acres additional.[12]

However, the Government does not believe that this interpretation accords with the facts. The transfer of 175,000 acres to the Seminoles in 1882 was not considered as made in execution of the 1866 treaty but as a measure of grace to relieve hardship which would otherwise result from Rankin's mislocation of the Creek dividing line.[13] See Sen. Doc. No. 75, 47th Cong., 1st sess., p. 2 (1882). And in 1882 no shortage had yet been disclosed in the tract of land between the Bardwell and Robbins lines.

While the addition of 175,000 acres to petitioner's reservation gave the Seminoles much more land than they bought, the gift did not divest them of any rights acquired under the treaty unless, in con-

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[12] On this theory, the disposition by the Court of Claims of the present case would be consistent with its disposition in Finding 10 of *Seminole Nation* v. *United States*, No. 348, this Term. Cf. Brief for the United States, pp. 72–80. There the court allowed the Government a gratuity offset of $165,847.17 with respect to the 175,000-acre tract, having deducted 11,550.54 acres from the 177,297.71 acres which it found in the 175,000-acre tract and computing the price of difference at $1.00 per acre. See *infra*, pp. 19–21.

[13] In *Seminole Nation* v. *United States*, No. 348, this Term, in support of the holding of the Court of Claims that the $175,000 constituted a gratuitous expenditure, the Government argues (Br. 76–80) that it was under no obligation to make the expenditure.

nection with the gift, they released to the United States. However, no express release was made, nor would there seem to have occurred an implied release. Cf. *United States* v. *Santa Fe Pacific R. R.*, No. 23, this Term (decided December 8, 1941). A release would be implied only in the event that the 175,000-acre tract was bought and transferred to compensate for a deficiency in the 200,000-acre tract under the treaty of 1866. There is no basis for this implication because, at the time the Government purchased the 175,000 acres, there had been no suggestion of a shortage in the original area of land.

3. It is also the position of the Government that on the basis of the record before this Court, the Court should not be asked to affirm or modify the judgment below on other grounds, not disposed of by the Court of Claims in its findings and conclusions. We believe that there may be a shortage in the Seminole tract between the Bardwell and Robbins lines. Accordingly, the Government submits that the cause should be remanded to the Court of Claims for a determination by that court:

(a) Whether a deficiency exists and, if so, the extent of shortage.

(b) Whether the parties to the treaty of March 21, 1866, acquiesced in the visible boundaries marked by the Bardwell and Robbins lines and thus defined the 1866 "grant" by their conduct as extending only to the tract enclosed by those lines

and the two rivers. If there was such acquiescence, we think petitioner would have no claim against the United States for any shortage. *United States* v. *Stone*, 2 Wall. 525, 536–537; *Missouri* v. *Iowa*, 7 How. 659; *Virginia* v. *Tennessee*, 148 U. S. 503, 522–523; *Maryland* v. *West Virginia*, 217 U. S. 1, 40–41; *New Mexico* v. *Colorado*, 267 U. S. 30, 40; *Oklahoma* v. *Texas*, 272 U. S. 21, 44; *Knowles* v. *Toothaker*, 58 Me. 173, 175. But cf. *Chickasaw Nation* v. *United States* (C. Cls., decided May 5, 1941).[14]

(c) Whether, if there is a deficiency in which the parties have not acquiesced, the Seminole Nation received *title* in 1866 to land west of the Robbins line. Since the provisions of the treaty of March 21, 1866, contemplated a survey of the land purchased by the Seminoles in the west half of the Creek country, we think that the Seminole Nation acquired *title* later and only to the tract encompassed by the official surveys. Cf. *Stoneroad* v. *Stoneroad*, 158 U. S. 240. In that view of the case, petitioner acquired a cause of action against the United States, after the Robbins line was surveyed, for breach of the treaty to convey 200,000 acres of land between the Canadian River and its north fork; petitioner's suit, then, would properly be one for damages rather than compensation for land taken by the Government. Compare *Choctaw Na-*

[14] This last case is still pending in the Court of Claims under Rule 39a of that court.

tion v. *United States*, 119 U. S. 1, with *United States* v. *Creek Nation*, 295 U. S. 103. The measure of recovery would differ correspondingly, since petitioner would not be entitled to interest on the damages awarded for contractual default, while it would be entitled to interest on the value of land taken (from the time of the taking) as an element of just compensation. Accordingly, we think that under this theory of the case the Court of Claims should fix the liability of the United States for damages.

(d) Whether, if the Seminole Nation by virtue of the treaty of 1866 then acquired title to land west of the Robbins line and that land was, in consequence, subsequently taken by the Government, the taking occurred in 1872 (when the Pottawatomie Indians were placed in possession) or in 1892 and subsequent years (when patents to the lands were issued to individual Indians and to settlers under the homestead laws). Cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 495.

4. The disposition of the present case which we have suggested in the preceding section of this memorandum accords with the Government's position in *Seminole Nation* v. *United States*, No. 348, this Term. There the Seminole Nation filed a petition in the Court of Claims to recover upon claims other than the one here presented. In addition to contesting those claims, the Government advanced a number of items as gratuity offsets under

section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. Among these it included a claim for gratuity offset based on the purchase by the United States for the Seminoles from the Creek Nation in 1882 of the approximately 175,000 acres of land which lie between the Bardwell line and present Creek territory. The Government, conceding a shortage of 11,550.54 acres in the 200,000-acre tract, claimed an offset of $165,847.17 for the land transferred in 1882. The court found (93 C. Cls. 500, 561) that the United States had expended $177,397.71 for this land.[15] It deducted 11,550.54 acres of land (shortage) from the 177,397.71 acres ceded by the Creeks in 1882, found the difference to be 165,847.17 acres, and on the assumption that this land had cost the United States $1.00 per acre allowed a gratuity offset of $165,847.17; the court's theory was that the excess in the ceded tract over 11,550.54 acres was gratuitously fur-

[15] In *Creek Nation* v. *United States*, 93 C. Cls. 561, the petitioner had sought to recover compensation from the United States for 2,397.71 acres of land alleged to have been included by mistake in the 175,000-acre tract which the Creeks had ceded to the United States for the Seminoles. The Court there determined the excess to be 1,198.99 acres rather than 2,397.71 acres, but held that no recovery could be allowed. See n. 7, p. 7, *supra*. The Court of Claims probably arrived at the figure of $177,397.71 in the present case by adopting inadvertently the allegations of the Creek Nation's petition concerning the excess of acreage and by assuming that the Government paid $1 per acre for 177,397.71 acres. As stated at pages 7-8, *supra*, the United States expended $175,000 for the tract.

nished by the United States to the Seminoles (93 C. Cls. 500, 525, 526).

The Court of Claims in that case examined claims of the Nation totalling $1,153,022.72, and concluded that the United States was liable to the extent of $18,388.30; against that liability the court allowed gratuity offsets of $705,337.33 (93 C. Cls. 537). In this Court the Seminole Nation challenges the action of the Court of Claims in denying the remaining claims and in allowing certain items as gratuity offsets (including the $165,847.17 for the land given to the Seminoles in 1882). The Government there takes the position that $175,000 was expended by the United States in 1882 for the additional Seminole land, that this sum was expended gratuitously, and that no amount should have been deducted from the $175,000 in computing the corresponding offset;[16] since the Court of Claims allowed only a smaller amount, any error in its computation favors the Seminole Nation and affords no ground for complaint on the part of petitioner.

CONCLUSION

The Government is of opinion that the judgment below cannot be supported on either of the grounds stated in the opinion of the Court of Claims. We believe also that the judgment cannot be affirmed on other grounds, or, if necessary, properly modified,

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[16] See Brief for the United States, *Seminole Nation* v. *United States*, No. 348, this Term, pp. 74–80.

without additional findings. It is therefore respectfully submitted that the judgment should be reversed and the cause remanded to the Court of Claims for the appropriate resolution of one or more of the issues set forth in the third section (*supra*, pages 17–19) of this memorandum.

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MARCH 1942.

APPENDIX

Article III of the treaty of March 21, 1866, 14 Stat. 755, 756, between the United States and the Seminole Nation, provides, in part:

> In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of article first (1st), treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant and cession of their lands, estimated at two million one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole nation the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north

to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. * * *

Articles III and VIII of the treaty of June 14, 1866, 14 Stat. 785, 786, 788, between the United States and the Creek Nation, provide, in part:

ARTICLE III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; * * *.

ARTICLE VIII. It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the commissioner of Indian affairs, the expenses of which survey shall be paid by the United States.

Article I of the Treaty of February 27, 1867, 15 Stat. 531, between the United States and the Pottawatomie tribe of Indians, provides, in part:

> It being the intention of the government that a commission shall visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas, accompanied by delegates from the several tribes proposing to remove, it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation: * * *

The Act of May 23, 1872, c. 206, 17 Stat. 159 provides, in part:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to issue certificates by which allotments of land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians, and lying next west of the Seminole reservation in the Indian Territory, shall be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band, as follows, viz: * * *

The Act of March 3, 1873, c. 322, 17 Stat. 626, provides:

> Whereas by the third article of the treaty concluded with the Creek Indians June fourteenth, eighteen hundred and sixty-six, said Indians ceded to the United States, for the settlement of friendly Indians and freedmen, the west half of their entire domain, to be divided by a line running north and south; and whereas the recent survey of said line, made in conformity with the provisions of said treaty, includes within the limits of the Creek reservation, east of said line, some of the improvements made on a reservation selected on what was supposed to be the Creek ceded lands, for the Seminole tribe of Indians, which reservation is provided for in their treaty of March first, eighteen hundred and sixty-six, and also some of the improvements of the Sacs and Foxes, of the Mississippi tribe of Indians, made on a reservation intended to be established in accordance with the provisions of their treaty of February eighteenth, eighteen hundred and sixty-seven; and whereas said improvements have been made upon said lands by and for the aforesaid Indians, who have settled thereupon in good faith, in accordance with treaty stipulations; and whereas it is necessary, in order to secure these improvements to said Indians, and to insure them suitable reservations, that the lands occupied thereby should be granted to them; Therefore,
>
> BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES, OF THE UNITED STATES, OF AMERICA, IN CONGRESS ASSEMBLED: That the Secretary of the Interior be, and he hereby is, authorized to negotiate with the aforesaid Creek Indians for the relinquishment to the

United States of such portions of their country as may have been set apart in accordance with treaty stipulations, for the use of the Seminoles, and the Sacs and Foxes of the Mississippi tribes of Indians, respectively, found to be east of the line separating the Creek ceded lands from the Creek reservation, and also to negotiate and arrange with said tribes for a final and permanent adjustment of their reservations; and the Secretary shall report the result to Congress.

The Act of August 5, 1882, c. 390, 22 Stat. 257. 265, appropriates, in part:

> * * * To pay the Creek Nation of Indians for one hundred and seventy-five thousand acres of land now occupied by the Seminole Nation, the sum of one hundred and seventy five thousand dollars, as per agreement made in pursuance of the act of March third, eighteen hundred and seventy three, which agreement bears date February fourteenth, eighteen hundred and eighty one, and is now on file in the Department of the Interior; said sum to be immediately available. * * *

Articles I and II of the Pottawatomie agreement of June 25, 1890, ratified by section 8, of the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016, 1017 provide, in part:

> The Citizen Band of Pottawatomie Indians of the Indian Territory, in consideration of the fulfillment of the promises hereinafter made, hereby cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to the following described tract of country in the Indian Territory—according to Morrill's

survey, under contract of September third, eighteen hundred and seventy-two—to wit: Beginning at a point on the right bank of the north fork of the Canadian River, in section twenty-one, of township eleven north, range five east, where the western boundary line of the Seminole Reservation strikes said river; thence south with said boundary line to the left bank of the Canadian River; * * *

Whereas certain allotments of land have been heretofore made, and are now being made to members of said Citizen Band of Pottawatomie Indians, according to instructions from the Department of the Interior at Washington, under the act of Congress entitled, "An act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, and according to said instructions other allotments are to be made, it is further agreed that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, location and area, as those heretofore made, and when made shall be confirmed. When said allotments shall be so confirmed, and approved by the Secretary of the Interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned act of Congress: * * *.

Section 2 of Title I of the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides, in part:

> In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band. * * *

Letter of the Secretary of the Interior to the Commissioner of Indian Affairs:

> DEPARTMENT OF THE INTERIOR,
> WASHINGTON, D. C., *Nov. 9th, 1870.*

SIR: I have considered the recommendation, submitted in your letter of the 3rd inst. that the selection, made by the Pottawatomie Indians, of a tract of country in the Indian territory, for their future home be approved, and that authority be given for the removal of the tribe thereto, under the direction of the proper officer of the Indian Bureau.

The 1st Article of the treaty with the Pottawatomies of February 27th 1867, contemplates their removal to the Indian territory, and provides that a tract of land, not exceeding thirty miles square shall be set apart as a reservation for the exclusive use and occupancy of said tribe upon the terms and conditions set forth in the treaty.

The site selected by these Indians is reported as including the land between the Canadian River and

the North Fork of said river, and bounded on the East, by the West line of the Seminole lands, and extending west, from said boundary line, to embrace nine hundred square miles, to which they are entitled.

I hereby approve the selection made and give the authority for the removal of the Pottawatomies, as recommended by you, with the direction that, until the Western boundary of the Seminole country is surveyed and marked, they will locate so far West of that tribe as not to intrude upon their lands.

Very respectfully,

I am obt. Servant

C. DELANO, *Secretary.*

Hon. E. I. PARKER,

Com. Indian Affairs.

(Exhibit No. 347–348 before the Court of Claims in this case.)

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SUPREME COURT OF THE UNITED STATES.

No. 830.—October Term, 1941.

The Seminole Nation, Petitioner, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[May 11, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

The question presented for decision is whether the United States remains under any obligation to the Seminole Nation with respect to Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, which provides in part:

". . . The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor for the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, . . ."

Petitioner's claim is for just compensation for the alleged taking by the United States of an asserted deficiency in the tract granted by this Article.

Late in 1866, before the boundaries of the Seminole domain had been located, the Seminoles moved to what was assumed to be their treaty land.[1] The first survey of the line dividing the Creek and the Seminole territories, made by one Rankin, in 1868, under a

[1] Although negotiations were in progress with the Creeks at time the Seminole treaty was made and a treaty was signed with them on February 6, 1866, the Creek treaty was not concluded until June 14, 1866. See 14 Stat. 785. The dividing line between the two halves of the Creek country was not settled until the Bardwell survey was approved in 1872.

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contract with the Superintendent of Indian Affairs, was not approved by the Department of the Interior. In 1871 one Bardwell re-surveyed the dividing line and placed it seven miles west of the Rankin line. Two months later, at the direction of the Government, one Robbins ran the western boundary of the Seminole lands so as to include 200,000 acres from the Bardwell line. According to Robins' calculations 200,000.03 acres were included between the Canadian river on the south, the north fork of the Canadian river on the north, the Bardwell line on the east and the Robbins line on the west. The Bardwell and Robbins surveys were both approved by the Secretary of the Interior on February 5, 1872.

Meanwhile, pursuant to Article I of the Treaty of February 27, 1867, 15 Stat. 531,[2] the Pottawatomie tribe selected a tract bounded "by the West line of the Seminole lands"; and on November 9, 1870, the Secretary of the Interior approved that selection. In 1872, after the location of the Robbins line, the Pottawatomies occupied the territory immediately west of that line. Subsequently, the Government allotted and patented the lands west of the Robbins line to the Pottawatomies in severalty, or sold and patented them to settlers and turned the purchase price into the Treasury as public money.[3]

The Bardwell survey disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by the Seminoles, who had made substantial improvements on this land. In order that the Seminoles might retain the lands which they had

[2] By that Article the United States agreed that a delegation from the Pottawatomies should accompany a government commission to the Indian country " . . . in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation."

[3] Provision was made for allotting the lands to the Pottawatomies in severalty by Act of May 23, 1872, 17 Stat. 159, and Act of February 5, 1887, 24 Stat. 388. By an agreement ratified by Act of March 3, 1891, 26 Stat. 989, 1016-1047, the Pottawatomies ceded to the Government the tract assigned to them. It was stipulated in the agreement that all allotments in severalty, made or to be made, should be completed and confirmed, and that other allotments in severalty could be made until February 8, 1891. The ratifying act provided that the remaining lands were to be opened to settlement as public lands. 26 Stat. 1026.

improved, Congress authorized negotiations for the purchase of these lands east of the Bardwell line. Act of March 3, 1873, 17 Stat. 626. An agreement was entered into on February 14, 1881, with the Creek Nation whereby that Nation ceded land east of the Bardwell line to the United States, the agreement providing that the eastern boundary of the land ceded was to be drawn so that the tract would aggregate 175,000 acres. *Creek Nation* v. *United States,* 93 C. Cls. 561, 566. The Creeks received $175,000 for this tract. Act of August 5, 1882, 22 Stat. 257, 265. This land became a part of the Seminole domain and was disposed of either by allotment to members of the tribe or by sale for the account of the tribe.

The possibility of a deficiency in the original 200,000 acre tract was first suspected in 1900.[4] By an amended petition filed in the Court of Claims in 1937[5] the Seminole Nation alleged that owing to an error in the location of the Robbins line, the territory enclosed between the Robbins and Bardwell lines was 11,550.54 acres short of 200,000 acres, and that the United States took from the Seminoles 11,550.54 acres west of the Robbins line when the Government patented that land to individuals in 1892 and subsequent years. Judgment was prayed against the United States for value at the time of taking of the 11,550.54 acres, with interest at the rate of five percent per annum. The Court of Claims made no finding as to whether a shortage in fact existed in the tract between the Bardwell and Robbins lines but held that in any event the Seminole Nation was more than compensated for the alleged shortage by the Government's purchase for the Seminoles of 175,000 acres of land from the Creek Nation. The court also stated that even if petitioner were entitled to recover for any deficit in the 200,000 acre tract, the Government would be entitled to offset the value of the 175,000 acre tract as a gratuitous expenditure under the Act of August 12, 1935, 49 Stat. 571, 596, a value assumed to be far in excess of the value of whatever deficit there may have been. We granted certiorari because of the close connection be-

[4] Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, dated February 5, 1900.
Letter from the Acting Secretary of the Interior to the Commission to the Five Civilized Tribes, dated October 16, 1900.

[5] The original petition was filed in 1930. The amended petition was filed after the amendment to the jurisdictional act. 43 Stat. 133, as amended by 50 Stat. 650.

tween this case and *Seminole Nation* v. *United States,* No. 348 this Term, decided today.[6]

The judgment of the Court of Claims cannot be sustained on either of the grounds advanced.

I.

Underlying the denial of recovery for any deficit in the 200,000 acre tract because petitioner was compensated therefor "fifteenfold" by the receipt of an additional 175,000 acres, is the theory that the acquisition of land by the Seminoles under the Treaty of 1866 and the acquisition of additional land to the east by transfer from the Creeks in 1882 were but two parts of an integral transaction, intended to give the Seminoles 200,000 acres of land and thus discharge the obligation of the Treaty of 1866. However, the facts do not support that theory for in 1882 the suggestion that a shortage existed in the supposed 200,000 acre tract between the Bardwell and Robbins lines had not yet been advanced. There was therefore no thought at the time the transfer of the 175,000 acre tract was made that the Government thereby fulfilled its treaty obligation by compensating the Seminoles for a deficiency in the original tract.

II.

The Act of August 12, 1935, 49 Stat. 571, 596, directs the Court of Claims in suits by an Indian tribe or band "to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band." This language plainly requires the Court of Claims to find first that money is due from the United States, to consider then whether the United States has gratuitously spent sums for the benefit of the tribe and, if it finds such gratuitous expenditures, to offset them against the amount found due.

In allowing the gratuity offset here the Court of Claims fell short of complying with the requirements of the offset statute. There was no finding that the United States was under any liability to the Seminole Nation; the Court stated only that the value of the 175,000 acre tract was "far in excess of the value of what-

[6] Petitioner has here limited its claim to 10,351.82 acres, adopting the shortage given in the report, dated March 18, 1941, of Arthur D. Kidder, District Cadastral Engineer of the General Land Office, who surveyed the area after the original petition was filed.

The Government in this Court agrees to this proposition and suggests that the cause be remanded to the Court of Claims.

ever deficit there may have been." The shortcomings of this approach are evident. As we said in *Seminole Nation* v. *United States*, No. 348 this Term, decided today, gratuity offsets resemble a fund in a bank, to be drawn on by the Government as needed. If the Government owes nothing, it is entitled to a dismissal on that ground, and should not be compelled to use its gratuity offsets. If liability exists on the Government's part, the exact amount of gratuitous expenditures utilized to extinguish that liability, in whole or in part, should be precisely found and designated. The Government should not be held to satisfy its liability by the use of gratuity expenditures in excess of the liability. Conversely, the Indian tribe is entitled to have an exact determination of the amount owed it by the United States in order that an amount of gratuity expenditures equal to the liability may be exhausted, or that, if the available offsets are insufficient, it receive a money judgment for the difference. Otherwise confusion and the possibility of a double credit for a single offset arise, as this case and No. 348 abundantly demonstrate. In the latter case a gratuity offset in the amount of $165,847.17 on account of the purchase of the 175,000 acre tract from the Creeks was allowed, and here the assumed value of that tract is the offset employed by the Court of Claims.

The judgment is reversed and the cause remanded to the Court of Claims with directions to consolidate it with No. 348; to determine whether a shortage exists in the 200,000 acre tract; to determine whether the Government is liable therefor, and the amount of such liability, if a shortage exists; and, to find and designate the precise gratuitous expenditures used to offset the total liability, if any, arising from this claim and from Items Two and Five of No. 348.

So ordered.

Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice JACKSON dissents.